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No. 09-1140

In the Supreme Court of the United States

BANK OF GUAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Treasury bonds and other United States government obligations held by petitioner included a promise by the United States that interest on the bonds would be exempt from the Guam Territorial Income Tax, 48 U.S.C. 1421i.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 578 F.3d 1318. The opinion of the United States Court of Federal Claims (CFC) dismissing petitioner's complaint (Pet. App. 26a-59a) is reported at 80 Fed. Cl. 739. The opinion of the CFC on petitioner's motion for reconsideration (App., *infra*, 1a-10a) is unreported. In ruling on petitioner's motion for reconsideration, the CFC directed that its decision dismissing petitioner's claims be "reissued nunc pro tunc May 9, 2008," with certain substantive changes not relevant in this Court. That reissued decision is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2009. A petition for rehearing was denied on

December 18, 2009 (Pet. App. 60a-61a). The petition for a writ of certiorari was filed on March 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reproduced in an appendix to this brief. App., *infra*, 11a-13a.

STATEMENT

1. a. As part of the Organic Act of Guam, ch. 512, 64 Stat. 384, Congress imposed the Guam Territorial Income Tax (GTIT) on residents of Guam, including petitioner. See 48 U.S.C. 1421i. The GTIT follows the terms of the United States Internal Revenue Code, *mutatis mutandis*. See Pet. App. 3a; 48 U.S.C. 1421i(a), (b) and (e); *Gumataotao* v. *Director of Dep't of Rev. & Taxation*, 236 F.3d 1077, 1079-1081 (9th Cir. 2001) (discussing "mirroring" process for adapting provision of Internal Revenue Code to create the GTIT). The government of Guam collects and disburses the GTIT, relieving the Department of the Treasury of the need to collect and appropriate those proceeds. See Pet. App. 3a-4a; 48 U.S.C. 1421i(c). Correspondingly, Guamanians do not pay income tax to the federal government. See *Gumataotao*, 236 F.3d at 1079.[1]

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[1] See 26 U.S.C. 935(c)(3) (1982) ("[An individual resident of Guam] is hereby relieved of liability for income tax for such year [as he is a resident of Guam] to * * * the United States."). Although the current United States Code designates Section 935 as repealed, the reporter's note explains that repeal is effective under the conditions described in the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1277, 100 Stat. 2600 (reprinted at 26 U.S.C. 931 (2006) note (Effective Date of 1986 Amendment)). In particular, Section 1277(b) of the Tax Reform Act provides that 26 U.S.C. 935 is repealed "only if * * * an implementing

b. The Department of the Treasury is authorized by statute to issue United States Treasury bills, bonds, and other government obligations (USGOs). Pet. App. 4a. Although USGOs are subject to taxes imposed by Congress, see 31 C.F.R. 356.32(a), they are "exempt from taxation by a State or political subdivision of a State." 31 U.S.C. 3124(a). Cf. *The Banks* v. *The Mayor*, 74 U.S. (7 Wall.) 16 (1868) (holding USGOs not liable to state taxation absent congressional consent). Treasury regulations restate this rule, providing that USGOs shall "be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, or any of the possessions of the United States." 31 C.F.R. 309.4, 340.3. The regulations also define the term "State" to include a territory or possession of the United States, such as Guam. 31 C.F.R. 357.2. No statute or regulation, however, has ever expressly exempted USGOs from the GTIT. Pet. App. 5a; see 48 U.S.C. 1421i.

2. In 1976, the United States Court of Appeals for the Ninth Circuit (which embraces Guam, see 28 U.S.C. 41) addressed the question whether the GTIT constitutes "[t]he imposition by a[] State" of a tax for purposes of 12 U.S.C. 548. *Bank of Am., Nat'l Trust & Sav. Ass'n* v. *Chaco*, 539 F.2d 1226, 1226-1227 (per curiam).[2] The

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agreement [regarding territorial taxation] under [Tax Reform Act § 1271, 100 Stat. 2591] is in effect between the United States and [Guam]." Because there is no such implementing agreement with Guam, 26 U.S.C. 935 remains in force with respect to Guam. Corporate taxation follows a different set of rules, but generally Guam corporations do not pay tax to the federal government on interest income. See 26 U.S.C. 881.

[2] Section 548 of Title 12 allows States—defined by the statute to include Guam—"to tax the net income of a [national banking association] but once." *Bank of America*, 539 F.2d at 1227.

Ninth Circuit held that, because the GTIT was enacted by Congress rather than by the government of Guam, it "is not a tax imposed by Guam," and therefore is not properly regarded as a tax imposed by a State. *Id.* at 1227-1228; see Pet. App. 18a, 23a-24a & n.7.

Starting two years after the Ninth Circuit issued its decision in *Bank of America*, petitioner purchased the USGOs whose taxation is at issue in this case. Until 1986, the USGOs were issued in paper form and were imprinted with the recital, taken verbatim from the Treasury regulations, that they are exempt from "taxation * * * imposed * * * by any State, or any of the possessions of the United States." Pet. App. 5a, 75a; see *id.* at 64a para. 7 (complaint alleging that the "same" exemption "covenant" shown on the USGOs is set forth in Treasury regulations). "Although USGOs purchased after 1986 were no longer issued in paper form and therefore could not include the printed statement, various federal regulations maintained the language previously printed on the USGOs." *Id.* at 5a. Petitioner did not negotiate with the United States for a specific exemption from the GTIT or pay consideration for such an exemption. *Id.* at 23a-24a. For several years, petitioner's GTIT tax returns reported as taxable the income received from the USGOs. See *id.* at 23a n.7. In later years, however, petitioner ceased payment of the GTIT on that income. *Id.* at 5a-6a.

In 2001, the Ninth Circuit held in *Gumataotao* that 31 U.S.C. 3124(a) does not render USGOs exempt from the GTIT. Consistent with its prior decision in *Bank of America*, the court explained that "Congress, not the local legislature of Guam, imposed the tax on interest from federal bonds." 236 F.3d at 1082. In the wake of *Gumataotao*, the government of Guam issued petitioner

a notice of deficiency for tax years 1992-1994, and petitioner contested its liability for the GTIT by filing suit in the District Court of Guam. Pet. App. 6a. In 2002, the district court held that *Gumataotao* was controlling, and it dismissed petitioner's claim that the GTIT could not be collected on USGOs. *Bank of Guam* v. *Director of Dep't of Rev. & Taxation*, No. 01-00016, 2002 U.S. Dist. LEXIS 9662 (D. Guam May 14, 2002); see Pet. App. 6a. Petitioner did not appeal but instead settled the case by agreeing to pay $5 million in back taxes under the GTIT. *Id.* at 6a, 31a-32a.

3. In 2006, petitioner filed this suit against the United States in the United States Court of Federal Claims (CFC). Petitioner sued under the Tucker Act, 28 U.S.C. 1491(a), alleging that the United States had breached a contractual promise that petitioner's USGOs would not be subject to the GTIT. Pet. App. 62a-74a. Petitioner sought, *inter alia*, reimbursement of taxes it had paid under the GTIT, as well as reformation of its USGOs to oblige the United States to indemnify it against the GTIT. *Id.* at 7a, 67a-71a.

The CFC dismissed portions of petitioner's complaint as time-barred, and it dismissed the remainder of the complaint for failure to state a claim. Pet. App. 26a-59a. In dismissing petitioner's contract claim, the court understood petitioner's argument to be "that the United States government promised that income from the USGOs would be exempt from taxation imposed by any of the possessions of the United States." *Id.* at 52a. Relying on *Bank of America* and *Gumataotao* as persuasive authority, the CFC held that the government had not breached that promise because "the GTIT * * * is not imposed by Guam, but by Congress." *Id.* at 57a. The CFC likewise rejected petitioner's argument

for reformation. The court held that the complaint did not adequately plead a mutual mistake because it did "not allege that the United States Government, at any time, has acted to exempt entirely income earned from USGOs from the GTIT." *Id.* at 58a.

Petitioner moved for reconsideration. The CFC granted that motion as it pertained to a preclusion issue not before this Court, but denied reconsideration in all other respects. App., *infra*, 1a-11a. In its reply brief in support of its motion for reconsideration, petitioner brought to the CFC's attention (for the first time) certain correspondence between the Internal Revenue Service (IRS) and the governments of Guam and the United States Virgin Islands. In that correspondence, attorneys in the IRS's Office of Chief Counsel expressed the view that USGOs are not subject to tax under the GTIT or the GTIT's Virgin Islands counterpart, 48 U.S.C. 1397. See No. 07-32C, Mot. to Amend or Correct Filing App. Exhs. 2-11 (Fed. Cl. Apr. 23, 2008) (Sauers Decl.); Pet. App. 76a-97a (reproducing selected correspondence). The CFC held that, because petitioner had failed to submit those documents in a timely fashion, "reliance on them has been waived." App., *infra*, 3a (citing *Bluebonnet Sav. Bank, F.S.B.* v. *United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006)).

4. The Court of Appeals for the Federal Circuit affirmed. Pet. App. 1a-25a. The court of appeals recognized that the USGOs held by petitioner are express contracts with the United States, and that those contracts "provide that the USGOs will be exempt 'from all taxation . . . imposed . . . by' Guam." *Id.* at 15a-16a (quoting 31 C.F.R. 309.4, 340.3). The court held that the application of the GTIT to the USGOs did not cause a breach of the government's promise because the GTIT

is not a tax imposed by Guam. The court explained that, "[f]ocusing on the relevant question, it is quite clear that Congress, not Guam, enacted, authorized, or otherwise imposed the GTIT." *Id.* at 16a. The court based that conclusion on 48 U.S.C. 1421i (see Pet. App. 17a), on the Ninth Circuit's decisions in *Bank of America* and *Gumataotao* (see *id.* at 18a), and on petitioner's own complaint and statements in the litigation (see *id.* at 16a).

The court of appeals refused to consider "the various documents offered as parol evidence" to support petitioner's interpretation of its contract with the United States. Pet. App. 19a. The court explained that, "[b]ecause the laws and regulations governing USGOs, and thus the terms of the Bank's express contract, clearly do not exempt USGOs from taxation by the GTIT, such parol evidence cannot be considered to interpret the Bank's contract with the United States." *Ibid.* The court of appeals did not address the CFC's holding—which the United States had stressed on appeal, see Gov't C.A. Br. 32-34—that petitioner had waived any argument based on those documents by failing to bring them to the CFC's attention in a timely manner.

The court of appeals also rejected petitioner's contention that the government had breached an implied-in-fact contract to exempt the USGOs from the GTIT. Pet. App. 19a-21a. The court explained that "the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter." *Id.* at 20a (quoting *Schism* v. *United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002), cert. denied, 539 U.S. 910 (2003)). Finally, the court of appeals rejected on several grounds petitioner's argument that the contract between the parties should be reformed based on a theory of mutual mistake. *Id.* at 21a-24a. The court

explained that petitioner had alleged (at most) a mistake of law, but that mistakes of law could not be the basis for reformation. *Id.* at 22a. The court further pointed out that because the USGOs were not negotiated agreements, petitioner and the United States could not have "form[ed] a mistaken belief about a fact that was subject to negotiations." *Id.* at 22a-23a.[3]

ARGUMENT

Petitioner reads the court of appeals' decision to announce a broad rule that the United States may not be held liable for breaching its express promises when those promises go beyond the requirements of federal law. See, *e.g.*, Pet. i, 3, 7, 10-12. The court of appeals issued no such holding. Rather, it simply held that, because the GTIT is imposed by Congress, application of the GTIT to petitioner's USGOs did not breach the government's promise that the USGOs would be exempt from any tax imposed by Guam (or any other possessions). That holding is correct and raises no legal issue of broad importance.

Petitioner's effort to distinguish between the government's contractual and statutory obligations is particularly unavailing on the facts of this case. With respect to the taxability of petitioner's USGOs, the United States made no promise that referred specifically to the GTIT or otherwise went beyond the restrictions on taxa-

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[3] The court of appeals also reversed the CFC's dismissal of parts of petitioner's claims on statute-of-limitations grounds. Pet. App. 11a-13a. Although the Tucker Act's limitations period is jurisdictional, see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), the disagreement on this issue between the courts below does not cast doubt on this Court's authority to hear the case, since both courts agreed that petitioner's claims are timely at least in part.

tion established by applicable laws. The USGOs that petitioner purchased before 1986 included a printed statement that simply tracked the pertinent regulatory language, to the effect that the USGOs were exempt from any tax "imposed by" a State or United States possession. After that date, the USGOs were no longer issued in printed form, and the terms under which they were purchased were set forth solely in the relevant statutes and regulations. The court of appeals' analysis of the government's contractual commitment therefore was inextricably linked to the court's construction of the statutory and regulatory provisions that identify the taxes from which USGOs are exempt. The core premise of petitioner's argument—*i.e.*, that the government made contractual promises going significantly beyond its duties under applicable federal law—is thus misconceived.

The court of appeals' interpretation of petitioner's USGOs is correct and consistent with the Ninth Circuit's decisions in *Bank of America, National Trust & Savings Ass'n* v. *Chaco*, 539 F.2d 1266 (1976), and *Gumataotao* v. *Director of Department of Revenue & Taxation*, 236 F.3d 1077 (2001). In any event, the court of appeals' decision has little prospective significance, and its retrospective reach is limited to Guamanians who held USGOs and now seek to escape tax obligations on their income from those USGOs. Further review is not warranted.

1. Petitioner contends that the court of appeals contravened this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), by "focus[ing] on the language of the statute creating the GTIT" rather than "looking to the terms of the agreement between [petitioner] and the government." Pet. 12. That argument

lacks merit. With respect to exemption from tax, the United States in issuing the USGOs made no contractual commitment going beyond the terms of the applicable statutes and regulations. In determining that petitioner received the tax exemption it was promised, the court of appeals therefore necessarily focused on the pertinent statutory and regulatory language. Because there is no disparity between the terms of petitioner's contracts and the requirements of applicable law, *Winstar* has no meaningful bearing on this case.

a. Petitioner argued in the court of appeals that 31 U.S.C. 3124 and 31 C.F.R. 309.4, 340.3 supply some of the terms of the contract governing a USGO. See Pet. C.A. Br. 21 ("[G]overnment bonds are viewed as contracts between the Government and the owners, whose terms are fixed by statutes, regulations and offering circulars.") (quoting *Zelman* v. *Gregg*, 16 F. 3d 445, 446 (1st Cir. 1994)); *id.* at 22-23 ("The rights of any P rson . . . against the United States and the Federal Reserve Bank[s] with respect to" USGOs "are governed solely by Treasury regulations.") (quoting 31 C.F.R. 357.10); *id.* at 23 ("When these regulations are read together as a whole, as they must be, it is clear that [petitioner's] contract rights are defined by those regulations."). The court of appeals concluded that those provisions do not promise to exempt the USGOs from the GTIT, see Pet. App. 15a-19a, and that conclusion was correct, see pp. 16-17, *infra*.

The USGOs that petitioner purchased before 1986 were issued in paper form. See Pet. App. 5a. Petitioner's complaint alleges that those USGOs are imprinted with the express recital that they are "exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States." *Ibid.* (quoting

Compl. para. 7); see *id.* at 75a (sample bond). That language is taken verbatim from the Treasury regulations governing the tax status of USGOs. *Id.* at 5a; see, *e.g.*, 31 C.F.R. 309.4 (USGOs "shall be exempt from all taxation * * * imposed * * * by any State, or any of the possessions of the United States"). The USGOs also expressly reference the statutory limitation on their tax-exempt status set forth in 31 U.S.C. 3124. See Pet. App. 75a (sample USGO is tax-exempt "except as provided in 31 U.S.C. 3124"). Thus, with respect to the tax-exempt status of the USGOs that petitioner purchased, the government's only contractual promise was that petitioner would receive the exemption accorded by applicable law.

Petitioner asserts (Pet. 2) that "the federal government repeatedly declared that interest on the bonds would not be subject to the [GTIT]." Although this and similar statements in the petition are not accompanied by a citation, petitioner appears to refer to documents (some of which are reproduced at Pet. App. 76a-97a) that were attached to its reply brief in support of its motion for reconsideration in the CFC. Petitioner's reliance on this material is misplaced for several reasons.

First, the CFC held that petitioner had waived reliance on the documents it now appends to the petition by failing to bring them to the CFC's attention until its reply brief in support of its post-judgment motion for reconsideration. See App., *infra*, 3a (citing *Bluebonnet Sav. Bank, F.S.B.* v. *United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006)). Although the court of appeals rejected petitioner's reliance on those materials on other grounds, it identified no basis for concluding that the CFC's waiver holding was incorrect.

In any event, the materials do not reflect contractual promises to petitioner by the United States. On their

face, the materials authored by the United States were directed to the governments of Guam and the Virgin Islands. None of the documents was directed to petitioner, so it had no basis to believe they were contractual promises to it. Cf. 26 U.S.C. 6110(k)(3); *Vons Cos.* v. *United States*, 55 Fed. Cl. 709, 718 (2003) ("[T]he IRS 'positions' to which [the taxpayer] refers were never intended to be relied upon by any taxpayers except those to which the rulings were directed."). Indeed, the record in this case indicates that petitioner did not even possess these materials until after *Gumataotao* was decided and the District Court of Guam had ruled against petitioner in the deficiency litigation. See Sauers Decl. Exh. 1 (Freedom of Information Act response letter dated Sept. 20, 2002). Because these materials were unknown to petitioner in the decades during which it purchased USGOs, they could not possibly embody terms of the contracts it agreed to.

Nor, as the court of appeals recognized, would the materials even be suitable as parol evidence. The contractual terms of the USGOs are clearly set forth in the applicable statutes and regulations (and, with respect to the pre-1986 USGOs, in the written instruments that track the pertinent regulatory language), making resort to extrinsic evidence improper. See Pet. App. 19a (citing *McAbee Constr., Inc.* v. *United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)).

So far as tax exemption is concerned, there are consequently no contractual terms besides what is in the statute and regulations. It was therefore accurate and comprehensive for the court of appeals to state that "the laws and regulations governing USGOs, and thus the terms of [petitioner's] express contract, clearly do not exempt USGOs from taxation by the GTIT." Pet. App.

19a. Petitioner construes this and similar statements (see, *e.g.*, Pet. 14) as announcing a categorical rule that the United States may *never* be held liable for breaching a contractual promise that goes beyond the requirements of otherwise-applicable law. Taken in context, however, the court of appeals' claim is a modest one: it is a descriptive statement specific to the tax treatment of USGOs, not (as petitioner supposes, see Pet. 3, 9, 18) a prescriptive rule of law that applies to all government contracts.

b. Contrary to petitioner's contention (Pet. 1, 9-10), *Winstar* is largely irrelevant to the proper disposition of this case. In *Winstar*, two federal entities (the Bank Board and the FSLIC) were held to have entered into contracts with savings and loan institutions, promising certain treatment of goodwill as regulatory capital, but Congress then enacted legislation disallowing the promised regulatory accounting treatment. 518 U.S. at 843, 859-871 (plurality opinion). This Court held that the United States had breached its contracts with the savings and loan institutions, and that the United States was obliged to answer in damages. *Id.* at 843; *id.* at 919 (Scalia, J., concurring in the judgment). *Inter alia*, the Court rejected the United States' contention that any contractual restraint on the exercise of sovereign power (there, regulatory authority over banks) should be recognized only if expressed in unmistakable terms. *Id.* at 871-887 (plurality opinion) (holding that unmistakability doctrine did not apply); *id.* at 920-922 (Scalia, J., concurring in the judgment) (holding that promised regulatory treatment was so central to the contract as to be unmistakable).

This case, by contrast, does not involve a situation in which subsequently-enacted legislation prevented the

federal government from performing its contractual obligations. Congress enacted the GTIT in 1950, decades before petitioner began to purchase USGOs, and the statutes and regulations providing tax exemption for USGOs have not changed in any material respect since those purchases began. See Pet. App. 2a, 5a-6a n.3. As the court of appeals correctly held, the United States never promised petitioner that the USGOs would be exempt from the GTIT. The contracts between petitioner and the United States were executed within the framework of preexisting statutory and regulatory provisions governing the taxation of USGOs. The terms of the contracts explicitly incorporated those provisions and included no other terms as to tax exemptions. *Winstar* has nothing to say about the proper interpretation of a government contract that is subject to preexisting federal laws and that expressly conforms to their terms.

c. To the extent that *Winstar* is relevant to this case, it further undermines petitioner's claims. First, the Court in *Winstar* noted that "where 'a contract has the effect of extinguishing *pro tanto* an undoubted power of government * * * the authority to make it must clearly and unmistakably appear.'" 518 U.S. at 889 (plurality opinion) (quoting *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U.S. 265, 273 (1908)); see *id.* at 923 (Scalia, J., concurring in the judgment). Petitioner acknowledges that rule (at least in some form). Pet. 11 n.5. In *Winstar*, "the Bank Board and the FSLIC had ample statutory authority" to "make the contracts in issue." 518 U.S. at 890, 891 (plurality opinion); *id.* at 923 (Scalia, J., concurring in the judgment). Petitioner identifies no provision of law, however, that "clearly and unmistakably" authorizes the Department of the Treasury to is-

sue USGOs that are exempt from the GTIT, in derogation of 31 U.S.C. 3124.

Indeed, because the GTIT and ordinary federal income tax are materially identical—their terms are generally the same, see 48 U.S.C. 1421i(a), (b) and (e), and both taxes are imposed by Congress, see p. 16, *infra*—petitioner's argument logically implies that the Department of the Treasury could in its discretion contractually exempt interest on any USGO from taxation under the Internal Revenue Code. But the Department has no such authority. "The tax status of interest on [USGOs] and the tax treatment of gain and loss from the disposition of those [USGOs] is decided under the Internal Revenue Code of 1986," 31 U.S.C. 3124(b), and the current Code gives the Department of the Treasury no discretion to exempt USGOs from its terms.

Second, the plurality in *Winstar* recognized that the "unmistakability doctrine" applies to contractual waivers, through an exemption or otherwise, of the sovereign power to tax. To be effective, the tax power must be "specifically surrendered in terms which admit of no other reasonable interpretation." 518 U.S. at 875, 877 (plurality opinion) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). The plurality in *Winstar* expressly distinguished the promise at issue there (compensation for withdrawal of promised regulatory treatment) from the sort of contractual promise petitioner alleges here (indemnification against tax liability). See *id.* at 882 ("[A] damages award [to the *Winstar* plaintiffs would not] deprive the Government of money it would otherwise be entitled to receive (as a tax rebate would)."); see also *id.* at 880-883 & n.26. As the plurality explained, the former does not "bind[] the Government's exercise of * * * sovereign power," while "a request

for rebate damages" does constrain sovereign power because it "would effectively * * * exempt[] [petitioner] from the [tax] law by forcing the reimbursement of [its] tax payments." *Id.* at 881, 883 n.26.[4]

2. As the court of appeals correctly held, the GTIT is "imposed" by Congress rather than by the government of Guam. The GTIT was enacted by Congress as part of the Organic Act of Guam, and 48 U.S.C. 1421i remains the authority under which the GTIT exists. For administrative convenience, the government of Guam collects and disburses the GTIT, but that fact does not logically imply that Guam "imposes" the tax.

Rather, as petitioner acknowledges, "[i]n collecting the tax, Guam was acting as a federal agency." Pet. 17. In *Bank of America* and again in *Gumataotao*, the Ninth Circuit held that the GTIT is imposed by Congress and therefore is not a tax imposed by Guam. See pp. 3-5, *supra*. The ruling in *Gumataotao* is particularly significant because it involved the very statute and regulations that supply the terms of petitioner's USGOs. See 236 F.3d at 1082. And the District Court of Guam held that "the *Gumataotao* holding control[ed] the disposition" of petitioner's claim that USGOs are exempt from the GTIT. *Bank of Guam* v. *Director of Dep't of Rev. & Taxation*, No. 01-00016, 2002 U.S. Dist. LEXIS 9662, at *7 (May 14, 2002). We are aware of no decision to the contrary.

Petitioner attempts to distinguish *Gumataotao* by arguing that it involved a statute and regulations, not a

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[4] Petitioner suggests (Pet. 17) that the unmistakability doctrine does not apply to a tax assessed or collected in a territory. That is incorrect. The Court made no such territorial distinction in either *Winstar* or *Jicarilla Apache Tribe*, or in their precursors involving state government contracts. See *Winstar*, 518 U.S. at 873-877.

contract. Pet. 13. But that distinction is immaterial when, as here, the contract's terms track the statute and regulations. Petitioner's contention that "Guam 'imposes' the tax" (Pet. 15) logically implies that USGOs are exempt from the GTIT under the correct reading of the applicable statute and regulations. But even if that theory were meritorious, it would provide no basis for holding the United States liable for breach of contract. Rather, petitioner's argument implies that the District Court of Guam (bound by the Ninth Circuit's prior ruling in *Gumataotao*) erred in holding that petitioner's USGOs are subject to the GTIT. Petitioner identifies no contractual language, however, that could plausibly be construed as a promise by the United States to compensate petitioner for losses incurred as a result of an allegedly incorrect judicial ruling in a case to which the government was not a party.[5]

3. In any event, the court of appeals' decision has little prospective importance. At least since the Ninth Circuit's decision in *Gumataotao* in 2001, it has been clear that USGOs are not exempt from the GTIT. No one who purchased USGOs after that date could reasonably have believed that USGOs carry a contractual promise that they are not subject to the GTIT.

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[5] Petitioner is in substantially the same position as a person who (1) holds a corporate bond promising it is "taxable in accordance with law," (2) receives an adverse decision from the Tax Court about how the tax laws apply, and then (3) sues the bond issuer, arguing that the Tax Court's decision is incorrect and that the bondholder has been deprived of its contractual right to be taxed "in accordance with law." Both petitioner and the hypothetical corporate bondholder may be disappointed by the relevant court's decision, but neither can fairly claim that its contractual counterparty is in breach.

The retrospective significance of the decision below is slight, and perhaps limited to this case alone. The court of appeals spoke only to the terms of USGOs, not to other government contracts. The decision below affects only residents of Guam (and perhaps certain other territories), not residents of the several States. And the Tucker Act's jurisdictional six-year limitations period, 28 U.S.C. 2501, further limits the class of potential plaintiffs. Indeed, petitioner's claim appears to be unique; we are aware of no other plaintiff who has asserted in the CFC that the United States contracted to exempt USGOs from the GTIT.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

APPENDIX A

UNITED STATES COURT OF FEDERAL CLAIMS

No. 07-32C

BANK OF GUAM, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

(Filed: May 9, 2008)

ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

MILLER, Judge.

On March 12, 2008, the court issued its memorandum opinion and order granting defendant's motion to dismiss plaintiff's complaint with respect to all tax years prior to 2001 for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) as barred by the statute of limitations, *see Bank of Guam v. United States*, 80 Fed. Cl. 739, 745-46 (2008) (citing *John R. Sand & Gravel*, __ U.S. __, 128 S. Ct. 750, 757 (2008) (reaffirming precedent under principles of *stare decisis* that Tucker Act's statute of limitations is "jurisdictional")); the fourth count of plaintiff's complaint for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1), *see id.* at 746-47; and the first, second, and third counts of plaintiff's complaint for failure to state a claim pursuant to RCFC

12(b)(6). *See id.* at 751-53. On March 24, 2008, plaintiff filed its Motion for Reconsideration pursuant to RCFC 59. Defendant responded on April 10, 2008. Plaintiff moved for leave to reply on April 18, 2008, and on April 23, 2008, to amend its proffered reply brief. On April 30, 2008, the court granted plaintiff's motions for leave to reply and to amend, ordering that the reply brief was filed that date. Defendant moved on May 6, 2008, to file a surreply, which the court allowed to be filed on May 8, 2008.

FACTS

A full explication of facts and background, set forth in the court's March 12, 2008 opinion, is unnecessary. *See Bank of Guam*, 80 Fed. Cl. at 741-44. Recitation of the facts germane to the parties' contentions is incorporated into the discussion.

DISCUSSION

1. Standard of review on motion for reconsideration

RCFC 59(a)(1) provides that the court may grant "[a] new trial or rehearing or reconsideration . . . to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." When presented with an RCFC 59 motion, the court may open a judgment entered, take additional testimony, amend findings of fact and conclusions of law, and direct entry of a new judgment. *Id.*

Granting an RCFC 59 motion lies within the discretion of the court. *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Stockton E.*

Water Dist. v. United States, 76 Fed. Cl. 497, 499 (2007). "Motions for reconsideration must be supported 'by a showing of extraordinary circumstances which justify relief.'" *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000) (unpubl. table)). To show entitlement to relief a movant must establish a "manifest error of law, or mistake of fact," by showing "(1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice." *Stockton E. Water Dist.*, 76 Fed. Cl. at 499 (internal quotations omitted).

Reviving unsuccessful arguments and/or making new arguments not previously presented is impermissible in a motion for reconsideration, as such a motion "'is not intended to give an unhappy litigant an additional chance to sway the court.'" *Stockton E. Water Dist.*, 76 Fed. Cl. at 499-500 (quoting *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992)); *see also White Mountain Apache Tribe v. United States*, 9 Cl. Ct. 32, 35 (1985) ("'The reargument of cases cannot be permitted upon the sole ground that one side or the other is dissatisfied with the conclusions reached by the court.'" (quoting *Roche v. Dist. of Columbia*, 18 Ct. Cl. 289, 290 (1883))).

The court deflects the cache of documents in plaintiff's possession since 2002 that plaintiff submitted with its reply brief. To the extent that any of them may relate to a new argument or support one rejected previously, reliance on them has been waived. *See Bluebonnet Sav. Bank v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006) ("[A]n argument made for the first time

in a motion for reconsideration comes too late, and is ordinarily deemed waived and not preserved for appeal.").

2. Plaintiff's motion for reconsideration

1) Statute of limitations

In its complaint plaintiff alleged contracts with the United States, including a promise that the United States Government obligations ("USGOs") purchased by plaintiff would be "'exempt from all taxation now or hereafter imposed . . . by . . . any of the possessions of the United States.'" *Bank of Guam*, 80 Fed. Cl. at 741 (alterations in original) (quoting Compl. in *Bank of Guam*, No. 07-32C, ¶ 7 (Fed. Cl. Jan. 17, 2007)). The court granted defendant's motion to dismiss plaintiff's complaint, ruling that "filing of the Notice of Deficiency in January 2001 . . . constituted an actual breach" triggering the six-year statute of limitations. *Bank of Guam*, 80 Fed. Cl. at 746. Plaintiff contends that the court "erred when it ruled that Guam's Notice of Deficiency was the point of the alleged breach, rather than the date of the actual payment of the tax which occurred in 2003." Pl.'s Br. filed Mar. 24, 2008, at 1. Plaintiff marshals a number of citations to statutes and cases relating to tax refund suits in support of its contention that the United States breached contracts with plaintiff only upon plaintiff's payment of tax. *See id.* at 1-3.

Plaintiff cites 26 U.S.C. ("I.R.C.") § 6213 (2000), for the proposition that "after a Notice of Deficiency is mailed, the taxpayer has stated periods of time within which to file a petition for redetermination of the deficiency in the Tax Court." Pl.'s Br. filed Mar. 24, 2008, at 2. Arguing that "the filing of the Notice of Deficiency does not constitute a 'time fixed for performance' of the

payment of the tax," plaintiff disqualifies this event as constituting a breach commencing the six-year statute of limitations. *Id.* Plaintiff suggests that, because "[y]ears of litigation may follow before any such tax is ultimately found to be owing and then paid[,]" and because "[t]he amount of tax paid may be redetermined . . . and may turn out to be quite different from that originally assessed[,]" the mere filing of the Notice of Deficiency does not establish a time fixed for performance with sufficient particularity or definiteness to constitute breach. *Id.* Plaintiff also cites for support of this proposition I.R.C. § 6511; *United States v. Brockamp*, 519 U.S. 347 (1997); *Johnson v. United States*, 54 Fed. Cl. 187, 193 (2002); and *Purk v. United States*, 30 Fed. Cl. 565, 570 (1994). None of the authorities cited substantiates plaintiff's argument.

Plaintiff confuses an action for a refund of taxes with the breach of contract action that it is pursuing in this case. I.R.C. § 6213 concerns tax refund suits and petitions to the United States Tax Court. Plaintiff has taken pains to emphasize that its complaint alleges a contract between the United States and it. Plaintiff's complaint seeks damages for breach of this contract, not a refund for taxes that were unlawfully levied and paid, as in a tax refund action. Moreover, the United States Court of Federal Claims is not the United States Tax Court, nor does it share a common statutory jurisdictional grant. *See Rocovich v. United States*, 933 F.2d 991, 993-94 (Fed. Cir. 1991) (discussing jurisdictional requirements for tax refund suit in United States Court of Federal Claims); *cf.* 28 U.S.C. §§ 1346(a)(1), 1491 (2000).

Brockamp, according to plaintiff, suggests that "tax collecting requires very precise compliance with statu-

tory rules." Pl.'s Br. filed Mar. 24, 2008, at 2. The proposition may not be arguable, but the holding of *Brockamp*—that the statutory limitations period on tax refund claims does not authorize equitable tolling, 519 U.S. at 354—does not relate to plaintiff's argument, let alone support it. Indeed, in *Brockamp* the United States Supreme Court highlighted the differences between tax refund suits and private suits for restitution, prefacing its analysis by "assum[ing], favorably to the taxpayers but only for argument's sake, that a tax refund suit and a private suit for restitution are sufficiently similar to warrant asking . . . [i]s there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *Id.* at 350. A breach of contract claim against the United States prosecuted in the Court of Federal Claims is in the nature of a private suit for restitution. *See AINS, Inc. v. United States*, 365 F.3d 1333, 1344 ("'It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.'" (quoting *AINS, Inc. v. United States*, 56 Fed. Cl. 522, 544 (quoting 62 Cong. Globe, 37th Cong., 2d Sess., App. at 2 (1862) (President Lincoln's 1861 Annual Message to Congress)))).

Plaintiff's citations to I.R.C. § 6511, *Johnson*, and *Purk* also are inapposite. I.R.C. § 6511(a) requires taxpayers to file any tax refund suit "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." The language in *Johnson* and *Purk* that plaintiff cites stands only for the proposition that this statute of limitations applies and is jurisdictional in nature. *See Johnson*, 54 Fed. Cl. at 193 (holding that three-year tax refund limitations period applies to plaintiff attempting

to obtain refund by asserting putatively contract-based claim); *Purk*, 30 Fed. Cl. at 570 (holding that filing tax-refund suit within limitations period is jurisdictional prerequisite).

Plaintiff's complaint alleged a contract whereby the United States promised to exempt USGOs from the imposition of tax by a possession. Plaintiff characterized the imposition of the Guam Territorial Income Tax as such a tax. The Notice of Deficiency served as the mechanism by which the disputed tax was imposed. This imposition constituted breach of the contract that plaintiff alleges and began running the six-year statute of limitations applicable to contract claims. *See Bank of Guam*, 80 Fed. Cl. at 746.

Both plaintiff and defendant have expressed some confusion over the ordering language in the first paragraph of the court's opinion, whereby the court granted "[d]efendant's motion to dismiss pursuant to RCFC 12(b)(1) . . . with respect to all tax years prior to 2001." *Id.* at 753. In the interest of clarity, the court restates its holding with respect to the statute of limitations: The six-year statute of limitations on plaintiff's breach claims began running at the latest on January 24, 2001, with the filing of the Notice of Deficiency. Because plaintiff's complaint was filed on January 17, 2007, the court lacks subject matter jurisdiction over any tax years prior to 2001; defendant's 12(b)(1) motion with respect to all tax years prior to 2001 was granted on this predicate holding.

The foregoing discussion explains why plaintiff's contention that the breach occurred only in 2003, upon payment of the tax, is incorrect. In the course of its motion to dismiss and again in its response to plaintiff's motion

for reconsideration, defendant has suggested that the statute of limitations commenced upon passage of the Organic Act of Guam in 1950 that authorized the imposition of the Guam Territorial income tax, because that was the only action that the United States undertook that might have constituted the breach that plaintiff alleges. *See* Def.'s Br. filed Apr. 10, 2008, at 17 n.17; Def.'s Br. filed Apr. 18, 2007, at 12-14. Defendant's argument postulates a breach antecedent to a contract. Plaintiff did not purchase any USGOs and therefore did not enter into any alleged contract with the United States until 1978; a breach cannot occur before the formation of a contract.

Given that the six-year statute of limitations began running, at the latest on January 24, 2001, the court lacks subject matter jurisdiction over plaintiff's claims for tax years prior to 2001.

2) Claim preclusion

The court's discussion concerning claim preclusion or *res judicata* for the tax years 1992, 1993, and 1994, was erroneous. The parties to the previous suit were not identical, *i.e.*, the Director of the Guam Department of Revenue and Taxation cannot be treated as the United States, even if acting under authorization of U.S. statute. Therefore, the court reissues its opinion *nunc pro tunc* to March 12, 2008, deleting the discussion on slip. op. pages 12 and 15-16, which had no bearing on the grant of defendant's motion. *See Bank of Guam*, 80 Fed. Cl. at 748, 750.

3) The remainder of plaintiff's arguments

The remainder of plaintiff's motion is a digest of the arguments that it has made, defendant has met, and the

court has not accepted. Plaintiff has not identified any intervening change in the controlling law, any previously unavailable evidence that is now available, or any ground that would counsel grant of its motion for reconsideration to prevent manifest injustice. Instead, plaintiff has used the motion for reconsideration as another opportunity to rehash its arguments at length. Plaintiff's arguments were not availing in response to defendant's motion to dismiss, and motions for reconsideration are "'not intended to give an unhappy litigant an additional chance to sway the court.'" *Stockton E. Water Dist.*, 76 Fed. Cl. at 499 (quoting *Bishop*, 26 Cl. Ct. at 286).

Finally, based on plaintiff's record on reconsideration and the record before the court when defendant's dispositive motion was pending, defendant is correct that allowing plaintiff to amend the complaint would be futile. *See Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403-04 (Fed. Cir. 1989). Plaintiff's pastiche of rejected arguments and groundless accusations of foul briefing tactics levied at defendant militate against any further indulgence to plaintiff.

CONCLUSION

For the foregoing reasons,

IT IS ORDERED, as follows:

1. Plaintiff's motion for reconsideration is denied, except insofar as the court deletes all references to claim preclusion from the opinion issued March 12, 2008.

2. The court reissues its March 12, 2008, opinion this date, *nunc pro tunc*, deleting all references to claim preclusion.

IT IS SO ORDERED.

/s/ CHRISTINE O.C. MILLER
CHRISTINE ODELL COOK MILLER
Judge

APPENDIX B

1. 31 U.S.C. 3124 provides in pertinent part:

Exemption from taxation

(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. * * *

* * * * *

(b) The tax status of interest on obligations and dividends, earnings, or other income from evidences of ownership issued by the Government or an agency and the tax treatment of gain and loss from the disposition of those obligations and evidences of ownership is decided under the Internal Revenue Code of 1986. * * *

* * * * *

2. 48 U.S.C. 1421i provides in pertinent part:

Income tax

(a) Applicability of Federal laws; separate tax

The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam: *Provided*, That notwithstanding any other provision of law, the Legislature of Guam may levy a separate tax on all taxpayers in an amount not to exceed 10 per centum of their annual income tax obligation to the Government of Guam.

(b) Guam Territorial income tax

The income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

* * * * *

3. 31 C.F.R. 309.4 provides in pertinent part:

Taxation.

The income derived from Treasury bills, whether interest or gain from the sale or other disposition of the bills, shall not have any exemption, as such, and loss from the sale or other disposition of Treasury bills shall not have any special treatment, as such, under the Internal Revenue Code, or laws amendatory or supplementary thereto. The bills shall be subject to estate, inheritance, gift or other excise taxes, whether Federal or State, but shall be exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, or any of the possessions of the United States, or by any local taxing authority. * * *

* * * * *

4. 31 C.F.R. 340.3 provides:

Taxation.

The income derived from the bonds will be subject to all taxes imposed under the Internal Revenue Code of 1954. The bonds will be subject to estate, inheritance, gift or other excise taxes, whether Federal or State, but